Supreme Court, U.S.
FILED
AUG 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

(7)

No. 87-2010

In The

Supreme Court of the United States

October Term, 1988

State of California, *et al.*,

Petitioners,

vs.

The United States of America, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the California Supreme Court

BRIEF IN OPPOSITION OF RESPONDENT-INTERVENOR SIERRA CLUB

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I. STATEMENT OF THE CASE

At issue in this case is whether the United States, like all other proprietors of riparian land in California, enjoys under state law riparian water rights that it may use to effectuate congressionally mandated management objectives for its forest reservation lands in California. Unanimously, the California Supreme Court, relying upon its historic decision in *Lux v. Haggin*, 69 Cal. 255 (1886), has held that the United States enjoys riparian rights under California law with respect to its lands reserved for national forest purposes. *State Water Resources Control Board, et al. v. United States*, 44 Cal.3d 448, 243 Cal. Rptr. 887 (1988).

Petitioners ask this court to rule that since the United States acts only in a sovereign capacity with respect to its lands, and not in a proprietary capacity, it cannot enjoy the same riparian water rights that California law grants to other proprietors of riparian lands. In so framing the question, petitioners ignore the long-established principle that the United States can and does act in a proprietary capacity with respect to its lands, and that its proprietary rights may be established by reference to state law.

Additionally, petitioners ask this Court to hold that under *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), the United States has divested itself of all "proprietary" interests in water in connection with its reserved lands and has dedicated those waters completely to the states for allocation and use by private parties in accord with state law. If, as petitioners claim, the United States has divested itself of all water rights associated with its reserved and withdrawn lands, it cannot claim riparian water rights arising under state law for secondary reservation purposes.

Petitioners predicate this second claim on a reading of *California Oregon Power* that has never been countenanced or adopted by this Court. In *California Oregon Power*, this Court fashioned a nationally uniform rule of federal conveyancing to determine if any federal rights in water passed to grantees of federal lands. When it stated in *California Oregon Power* that the Desert Land Act of 1877, 43 U.S.C. § 321 *et seq.*, had severed federal water rights from federal lands, this Court meant only that when federal lands were granted to private individuals for agricultural and homesteading purposes, no federal water rights were transferred. Since the Desert Land Act of 1877 did not apply to lands that are withdrawn or reserved, *Federal Power Commission v. Oregon*, 349 U.S. 435, 443-444 (1955), *Cappaert v. United States*, 426 U.S. 128 (1976), this Court, in *California Oregon Power*, had no occasion to decide what water rights remained attached to federal lands that were withdrawn or reserved from operation of the public land laws and therefore could not be granted to private individuals. In *United States v. New Mexico*, 438 U.S. 696 (1978), this Court held that the United States is entitled to use water obtained under state law on its reserved lands for "secondary reservation purposes."

Over the last century, numerous forest reservations, national parks, wildlife refuges, and wilderness areas have been designated by statute or by executive action pursuant to statutory authorization. All of these lands are intended to be retained in public ownership for a variety of public uses and cannot be transferred or conveyed

under public land disposal statutes.[1] The question thus posed by this case is whether the United States can enjoy water rights arising under state law with respect to its reserved lands in order to manage such lands for secondary management objectives prescribed by Congress in the varied laws designating such areas and reserving them for special uses. The California Supreme Court was correct when it unanimously concluded that consistent with a Congressionally prescribed secondary management objective, the provision of water for wildlife, for which federal reserved rights are not available, *see United States v. New Mexico*, 438 U.S. at 702-704, the United States

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[1] The public domain includes lands that are open to settlement, public sale or other disposition under the federal public land laws, and not exclusively dedicated to any specific governmental or public purpose. *See Federal Power Commission v. Oregon*, 349 U.S. 435, 443-44 (1955) (*Pelton Dam*); *United States v. Minnesota*, 270 U.S. 181, 206 (1926). Public domain lands are for the most part managed by the Department of the Interior, through its Bureau of Land Management (BLM). Reserved lands are lands that have been expressly withdrawn from the public domain by statute, executive order, or treaty, and dedicated to a specific federal purpose. As a general rule, land that has been withdrawn from the public domain is no longer subject to laws governing the disposition or sale of public lands. *See Federal Power Commission v. Oregon, supra*, 349 U.S. at 443-444.

Until the last quarter of the 19th century the emphasis of Congress was on the disposal of the public lands. Some of the land originally owned by the federal government has accordingly been patented under the terms of the federal public land laws. The term "public land laws" is generally used to refer to statutes providing for the sale or disposition of public lands, such as the Homestead Act, May 20, 1862, 12 Stat. 392,

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enjoys the same water rights under California law as any other owner of riparian real property.[2]

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43 U.S.C. § 161 (1970) (*repealed* 1976), and the Desert Land Act of 1877, March 3, 1877, 19 Stat. 377, 43 U.S.C. § 321 *et seq.* A major shift in public land policy, from disposal to conservation, began in 1872 when the lands that eventually became Yellowstone National Park were withdrawn from entry and settlement. Act of March 1, 1872, codified at 16 U.S.C. § 21. *See, e.g.*, National Park Service Act of August 25, 1916, 39 Stat. 535, *as amended*, 16 U.S.C. § 1 *et seq.* This conservation ethic was evidenced further in 1891 when Congress enacted a statute authorizing the President to create forest reserves. Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1095 (repealed 1976). Eventually the conservation ethic resulted in the reservation and withdrawal of lands for national forests, national parks, wildlife refuges, wilderness areas, and national recreation areas.

The Taylor Grazing Act of 1934, 43 U.S.C. § 315 *et seq.*, set aside eighty million acres as grazing preserves. This Act, along with two executive orders withdrawing the remaining public land from homestead entry, resulted in a *de facto* closing of the public domain (excluding certain portions of Alaska) to homesteading and entry under other public land laws as of 1935.

[2] California has a dual system which recognizes both appropriative and riparian water rights. The riparian doctrine confers upon the owner of land contiguous to a watercourse the right to the reasonable and beneficial use of water on his land. *National Audubon Society v. Superior Court of Alpine Co.*, 33 Cal.3d 419 (1983). Since the adoption of the constitutional amendment of 1928, the riparian owner is limited to a reasonable beneficial use of the water under reasonable conditions of diversion and use. Cal. Const. Art. XIV, § 3 (1928) (current version at Cal. Const. Art. X, § 2). *See Fullerton v. State Water Resources Control Bd.*, 90 Cal. App.3d 590, 596 (1979). For a

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Congress has never divested the federal reserved lands of water rights accruing to them under state law. To the contrary, Congress has manifested its willingness and desire that federal land management agencies enforce and claim water rights under state law to accomplish the secondary purposes for which it has reserved federal lands. The unanimous decision of the California Supreme Court was correct and need not be reviewed by this Court. This Court should therefore deny the Petition for Certiorari.

II. SUMMARY OF OPINION BELOW

The California Supreme Court unanimously held that the United States has enforceable riparian rights with respect to lands reserved for forest purposes in California. In so holding, the California Supreme Court followed "the long-established principle that Congress not only may, but nearly always has, deferred to state law in determining rights to water on federal lands." 243 Cal. Rptr. at 893. According to the Court, this "principle of deference" extends to riparian rights recognized under California law. *Id.* Longstanding principles of California law relating to riparian water rights require application of that doctrine to lands of the United States. *Id.* at 898. The Court held that since the United States holds its

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general history of the development of the riparian doctrine in California, *see U.S. v. Gerlach Live Stock Co.*, 339 U.S. 725, 742-755 (1950) and D. Anderson, *Riparian Water Rights in California* 1-22, 49-61 (Governor's Commission to Review California Water Rights Law, Staff Paper No. 4, 1977). *See also* W. Hutchins, *The California Law of Water Rights* 178 *et seq.* (1956).

lands in both a proprietary and sovereign capacity, it was not barred by any principle of federal law from enjoying proprietary water rights under state law. *Id.* at 892-893.

The California Supreme Court rejected the State's contention that Congress affirmatively relinquished all proprietary claims to the waters of the West through the enactment of the Desert Land Act of 1877, *supra*. The Court held that the United States had not relinquished such proprietary claims to water on its reserved lands, since Congress had never expressed any intent to relinquish such claims on lands reserved from the public domain. The Court stated: "Indeed, had that been Congress' intent, it is reasonable to assume that that is precisely what Congress would have said, and what the United States Supreme Court would have held . . ." 243 Cal. Rptr. at 897.

The Court also held that the riparian rights of the United States could have priority as against subsequent claimants. The Court could find no expression of Congressional intent to subject water rights held by the United States for secondary reservation purposes "to defeasance by subsequent claimants." 243 Cal. Rptr. at 900. Quoting from *Clark v. Uebersee Finanz-Korp*, 332 U.S. 480, 489 (1947), the Court stated: "We will not 'impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.'" Finally, the Court rejected the contentions of the petitioners that recognition of unexercised riparian rights in federal reserved lands would disrupt the settled rights of appropriators throughout the state and impair the Board's ability to plan and manage the allocation of the state's scarce water supply. 243 Cal. Rptr. at 900-901.

III. ALTHOUGH IN THREE NINETEENTH CENTURY PUBLIC LAND DISPOSAL LAWS CONGRESS INDICATED ITS INTENT TO ALLOW THE ACQUISITION OF WATER RIGHTS ON PUBLIC DOMAIN LANDS TO BE GOVERNED BY STATE LAW, CONGRESS DID NOT INTEND TO FORFEIT WATER RIGHTS ARISING UNDER STATE LAW WITH RESPECT TO RESERVED LANDS.

In three Acts enacted in the second half of the nineteenth century[3] Congress expressed its intent to defer to state law with regard to the acquisition of water rights on the public lands; but it expressed no intent to relinquish federal water rights on reserved lands not subject to disposition or entry under the public land laws. In the Mining Act of 1866 Congress included a provision that recognized as valid rights to the use of water on the public lands arising under state law:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. . . .

43 U.S.C. § 661.

Four years later, Congress amended the Mining Act of 1866 to extend its applicability to "placer" mines. Act of July 9, 1870, 16 Stat. 218, codified at 30 U.S.C. §§ 51, 52, and 43 U.S.C. § 661. The Act provided:

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[3] Act of July 26, 1866, 14 Stat. 253, codified at 30 U.S.C. §§ 51, 52 and 43 U.S.C. § 661; Act of July 9, 1870, 16 Stat. 218, codified at 30 U.S.C. §§ 51, 52 and 43 U.S.C. § 661; and the Desert Land Act of 1877, 19 Stat. 377, ch. 107, 43 U.S.C. § 321 *et seq.*

> All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by [the Mining Act of 1866].

43 U.S.C. § 661.

In 1877 Congress passed the Desert Land Act, *supra*, which permitted persons in thirteen western states to enter and receive patent to irrigable federal lands "by conducting water upon the same . . . [by] bona fide prior appropriation." In *California Oregon Power*, *supra*, this Court held that land patents granted by the federal government to settlers under the Desert Land Act did not convey any riparian water rights, because Congress, in the Desert Land Act, had declared its intention to patent title in land only and not interests in water. 295 U.S. at 158. In construing the Act as effecting "a severance of all waters upon the *public domain*, not theretofore appropriated, from the land itself," 295 U.S. at 158, 162 (emphasis added),[4] this Court stated:

> The fair construction of the [Desert Land Act of 1877] is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named . . . The terms of the

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[4] It is significant that Justice Sutherland described the separation of water rights from the conveyance of federal property as "severance." The need to "sever" such rights implies that federal water were pre-existing and attached to the land. In California, these preexisting federal water rights included riparian water rights arising under state law. With respect to reserved lands not subject to the Desert Land Act, these preexisting federal rights would not be severed.

> statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take legal title to the land conveyed, and such title and only such title to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location. *If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted.*
>
> What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the *public domain* became *publici juris,* subject to the plenary control of the designated states, including those since created out of the territories named, *with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain . . . [T]he Desert Land Act does not bind or purport to bind the states to any policy.* It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation.

Id. at 162-164 (emphases added).[5]

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[5] In *California v. United States,* 438 U.S. 645, 663 (1978) (quoting *Kansas v. Colorado,* 206 U.S. 46, 94 (1907)), this Court reaffirmed the principle "that each State may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State." Thus Congress has never federalized the doctrine of appropriation and has acquiesced in state recognition of riparian water rights.

In *Federal Power Commission v. Oregon (Pelton Dam)*, 349 U.S. 435 (1955), this Court held that the 1866, 1870, and 1877 Acts did not apply to federal "reserved" or "withdrawn" lands, but only to "public lands" of the United States. In so ruling, this Court stated:

> The purpose of the Acts of 1866 and 1870 was governmental recognition and sanction of possessory rights *on public lands* asserted under local laws and customs. *Jennison v. Kirk*, 98 U.S. 453, 25 L.Ed. 240. The Desert Land Act severed, *for purposes of private acquisition*, soil and water rights on *public lands*, and provided that such water rights were to be acquired in the manner provided by the law of the State of Location . . .
>
> It is not necessary for us, in the instant case, to pass upon the question whether this legislation constitutes the express delegation or conveyance of power that is claimed by the State [that all waters on federal land were under the exclusive sovereign control of the states by reason of the Desert Land Act of 1877], because these Acts are not applicable to the reserved lands and waters here involved. The Desert Land Act covers "sources of water supply upon the public lands. . . ." The lands before us in this case are not "public lands" but "reservations." Even without that express restriction of the Desert Land Act to sources of water supply on public lands, these Acts would not apply to reserved lands. "It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose." *United States v. O'Donnell*, 303 U.S. 501, 510, 58 S.Ct. 708, 714, 82 L.Ed. 980. (emphasis added)

349 U.S. at 447-448. In *Cappaert v. United States*, 426 U.S. 128, 144-5 (1976), this Court reiterated its earlier holding

in *Pelton Dam* that the Desert Land Act does not apply to reserved lands.[6]

This Court has discouraged broad interpretations of severance arising from *California Oregon Power*. In *Pelton Dam*, the Court characterized the Desert Land Act as "sever[ing], *for purposes of private acquisition*, soil and water rights *on public lands*." *Federal Power Commission v. Oregon, supra*, 349 U.S. at 448 (first emphasis added; second emphasis in original). In *Cappaert v. United States*,

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[6] Petitioners claim, Petition at 21, that in *United States v. New Mexico, supra*, this Court overruled, "*sub silentio*, its earlier analyses in *Pelton Dam* and *Cappaert* that the *Desert Land Act* does not apply on reserved lands." Petitioners are mistaken; *Pelton Dam* and *Cappaert* remain good law. In *United States v. New Mexico*, this Court held that the United States may claim water rights under state law to accomplish secondary purposes of federal reservations. Petitioners seriously mischaracterize this Court's ruling when they state that this Court held that "the Desert Land Act and Mining Act, among others, makes [sic] state appropriation laws applicable on reserved lands – to the extent that secondary purposes are involved." Petition at 21. In fact, this Court did not even mention those Acts as the theoretical underpinning of its ruling in *United States v. New Mexico*. Instead, this Court relied on several statutes authorizing establishment of water rights on reserved lands in accordance with state law. 438 U.S. at 702-703. This Court also discussed the Forest Service Organic Act of 1897, which provided that "all waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States. . . ." 30 Stat. 36, as amended, 16 U.S.C. § 481. The Organic Act of 1897 in no manner "severes", waives, or forfeits federal water rights arising under state law. Although the waters of national forests remain subject to appropriation, such appropriative uses would be junior to exercised federal water rights arising under state law.

supra, this Court characterized the Desert Land Act as "provid[ing] that patentees of public land acquire only title to land through the patent and must acquire water rights in non-navigable water in accordance with state law." 426 U.S. at 143.

At the time the Mining Acts and Desert Land Act of 1877 were passed, Congress was principally concerned not with possible federal-state conflicts over the use of water on the retained public lands, but rather with settlement of disputes between private claimants. The primary purpose of provisions of the acts dealing with water rights was to clarify that private patentees or users of federal lands for mining or grazing purposes would not acquire, by virtue of that patent or use, any rights to unappropriated water except as recognized by state law.

At the time the Desert Land Act was enacted in 1877, Congress had already authorized the creation of reservations and the making of withdrawals. Pursuant to such authorizations, a significant portion of the federal lands had already been withdrawn and/or reserved. From the first establishment of the federal government, Congress delegated authority to the Executive to make withdrawals and reservations of public domain lands. Wheatley, *Study of Withdrawals and Reservations of Public Domain Lands*, Public Land Law Review Commission, p. 55. Legislation relating to the disposition of land in the Territory of Michigan is representative of the delegation of general withdrawal authority for "public purposes" to the President. *Id.* at 56.[7] The President was also granted

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[7] The Act of March 3, 1807, ch. 34, § 2, 2 Stat. 437, 438, provided that confirmation of any claim to lands granted "shall not entend to any tract heretofore reserved, or which may be by the President of the United States set aside for public uses." *See* also the Act of March 1, 1847, ch. 32, § 2, 9 Stat. 146.

the authority to create military reservations. Act of June 13, 1812, ch. 99, § 2, 2 Stat. 748, 750; Act of March 1, 1817, ch. 22, 3 Stat. 347, *repealed by* 47 Stat. 1349; Act of September 27, 1850, ch. 76, § 14, 9 Stat. 496, 500. Additionally, the President was granted the authority to create Indian reservations. *See* Act of May 28, 1830, ch. 148, § 1, 4 Stat. 411, 412; Act of April 8, 1864, ch. 48, § 2, 13 Stat. 39, 40.[8]

The first national park reservation was created by Congress in 1872 when Yellowstone National Park was established. Act of March 1, 1872, ch. 24, § 1, codified at 16 U.S.C. § 21. The lands within the designated boundaries were "reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people." *Id.*

When Congress limited the applicability of the Desert Land Act to the "public lands," the distinction between "public lands" and "withdrawn" or "reserved" lands was well recognized. When Congress provided that "all surplus water over and above such appropriation and use, together with the water of all [sic], lakes, rivers and other sources of water supply upon the *public lands* and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes. . .," it was expressing its

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[8] Grants to states or directly to railroad companies for the construction of railroads within the granted areas often contained provisions for the withdrawal of lands in aid thereof. Wheatley, *id.*, p. 61. *See, e.g.*, Act of July 1, 1862, ch. 120, 12 Stat. 489, 492, 493.

intent to retain interests in the non-navigable waters on then reserved or withdrawn lands, or on lands reserved or withdrawn in the future.[9] This is why it limited the applicability of the Desert Land Act of 1877 to the *public lands*.

In *California Oregon Power*, this Court acknowledged the intent of Congress in the Desert Land Act to acquiesce in state adoption of rules of appropriation and/or the common law rules of riparian rights to determine private rights to use waters on lands patented by the United States. Therefore, in a state like California that has adopted a riparian water rights system, patentees of public domain lands enjoy riparian rights with priority as of the date of patent. As the California Supreme Court ruled in this case, California also recognizes riparian rights in lands retained by the United States. Since, under *California Oregon Power* "severance" or separation of the water rights from the lands takes place only when the lands are patented, "severance" never takes place with respect to reserved lands since such lands are to be retained by the United States. Therefore riparian rights arising under

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[9] If, as petitioners claim, Congress' intent in the Desert Land Act was to maximize the amount of water available to settlers of arid lands, then Congress would have made the Desert Land Act applicable to reserved as well as public domain lands. Moreover, it would have "federalized" the doctrine of appropriation by precluding the states from administering "dual systems" of water law that validated riparian rights and made it more difficult for appropriators to divert water. Contrary to petitioners' contention, Petition at 19, Congress has not, in aid of settlement of the arid lands of the West, manifested any intent to preclude the United States from claiming water rights arising under state law in connection with its reserved lands.

state law remain attached to reserved lands, subject to appropriations that were effectuated under local law prior to the date of the reservation. The United States enjoys priority, at the earliest, when public domain lands are reserved and therefore no longer subject to entry under the Desert Land Act, or other public land laws. *State Water Resources Control Board et al. v. United States, supra,* 243 Cal. Rptr. at 900-901.

Federal law is, under *United States v. New Mexico, supra,* the source of reserved water rights solely to accomplish primary reservation purposes. State law is the source of water rights to accomplish secondary management objectives prescribed by Congress for federal forest reservations.[10] The United States may employ its riparian rights conferred under state law for reasonable and beneficial uses, *see State Water Control Board et al. v. United States, supra,* 243 Cal. Rptr. at 889, n. 2, related to management of the national forests for secondary purposes. *See* IV, *infra.*

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[10] Secondary purposes of federal reservations include management for wildlife. The Forest Service is required to manage its lands for wildlife protection. 16 U.S.C. § 528 provides that "[i]t is the policy of Congress that the national forests are established and shall be administered for outdoor recreation range, timber, watershed, and wildlife and fish purposes." *See* 36 C.F.R. Part 241 (Wildlife) and 16 U.S.C. §§ 1604(e),(g). The Forest Service is obligated to prepare land use plans which take into account management of the forests for wildlife protection. 16 U.S.C. § 1604(g)(3)(A). The Forest Service is obligated to follow its land use plans, once they are promulgated, in its management of the national forests. 16 U.S.C. § 1604(i). Under 36 C.F.R. § 219.19, the Forest Service must manage fish and wildlife habitat to maintain viable populations of existing native species of vertebrates. *See also* 16 U.S.C. § 1604(g)(3)(B).

IV. THERE IS NO BASIS FOR PETITIONERS' ASSERTION THAT FEDERAL RESERVED WATER RIGHTS ARE THE EXCLUSIVE FEDERAL INTERESTS IN WATER THAT CAN EXIST WITH RESPECT TO RESERVED OR WITHDRAWN LANDS.

Petitioners make the argument that federal reserved rights are the exclusive interests in water that can be claimed by the United States pursuant to its Property Clause powers. Petition at 15. In *United States v. New Mexico, supra,* this Court rejected the notion that federal reserved rights were the exclusive federal water interests that could exist with respect to reserved lands. This Court held that federal reserved rights exist only to satisfy the primary purposes of reservations and that for secondary purposes of reservations water must be obtained under state law. 438 U.S. 702-703. Recognizing that Congress has authorized the Park Service to acquire water rights arising under state law to be used on federal reservations, 438 U.S. at 702, this Court cited the National Park Service Act of August 7, 1946, 16 U.S.C. § 17j-2, which provides appropriations for the

> establishment of water rights *in accordance with local custom, laws, and decisions of courts,* including the acquisition of water rights or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in the administration and public use of the national parks and monuments.

438 U.S. at 702-703 (emphasis in original). After noting that "the agencies responsible for administering the federal reservations have also recognized Congress' intent to acquire under state law any water not essential to the specific purposes of the reservation," 438 U.S. at 703, this Court cited 16 U.S.C. § 526, which authorizes the appropriation of funds "for the investigation and establishment of water rights . . . necessary or beneficial in connection

administration and public use of the national forests." 438 U.S. at 703, n. 6.

Petitioners base their entire argument on this Court's statement in *New Mexico* that:

> Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private *appropriator*.

438 U.S. at 702 (emphasis added). Read together with the next paragraph,[11] it is clear that this Court did not intend to limit the United States to appropriative rights in a state that has a dual system of water law, as does California. Rather, the selected Acts of Congress quoted by this Court, 438 U.S. at 703, make it clear that Congress has

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[11] That paragraph states:

> Congress indeed has appropriated funds for the acquisition under state law of water to be used on federal reservations. Thus, in the National Park Service Act of Aug. 7, 1946, 60 Stat. 885, as amended, 16 U.S.C. § 17j-2 (1976 ed.), Congress authorized appropriations for the "[i]nvestigation and establishment of water rights *in accordance with local custom, laws, and decisions of courts*, including the acquisition of water rights or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in the administration and public use of the national parks and monuments." (Emphasis added.) The agencies responsible for administering the federal reservations have also recognized Congress' intent to acquire under state law any water not essential to the specific purposes of the reservation.

438 U.S. at 702-703 (footnotes omitted, emphasis in original).

chosen to claim as federal property whatever water rights are recognized under local customs and laws when necessary to manage its reserved lands in accord with the secondary purposes of the reservation.

Although in the Desert Land Act of 1877 Congress severed federal interests in water from its interests in lands for the purposes of conveyance by patent of the federal lands to private individuals under the various public land disposal statutes, Congress has authorized federal land management agencies to claim state created riparian water rights in order to satisfy secondary management objectives of reserved or withdrawn federal lands. When all of its actions are considered together, it is clear that Congress has chosen to retain its interests in water arising under state law with respect to its reserved lands.[12] Congress has not demonstrated any intent not to enjoy the same proprietary water rights under state law with respect to its reserved lands as exist in privately owned riparian lands.

V. THE UNITED STATES CAN ENJOY PROPRIETARY WATER RIGHTS UNDER STATE LAW WITH RESPECT TO ITS LANDS.

At page 7 of their Petition for Writ of Certiorari, petitioners state "[t]he question whether the United

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[12] In *United States v. District Court, County of Eagle, Colorado*, 401 U.S. 520, 524 (1971), this Court stated that 43 U.S.C. § 666(a), which confers Congressional consent for the joinder of the United States in state procedures for the adjudication of water rights, applies to appropriative rights, reserved rights, and "riparian" rights "owned" by the United States. Although this statement was *dictum*, it constituted an acknowledgment by this Court of the United States' ownership of riparian rights that could be subject to state adjudication procedures.

States has riparian rights ultimately turns on whether the United States' property interests – of whatever nature – arise solely under the Property Clause, or instead whether the United States has the same property rights as ordinary landowners." The question need not be framed disjunctively, for there is no *a priori* reason why the United States, pursuant to its Property Clause Powers, cannot enjoy the same water rights arising under state law as private proprietors do. Given the power of Congress under the Property Clause to cede its constitutional authority over unappropriated water on the federal lands to the states, acknowledged in *California Oregon Power, supra,* Congress must clearly also have the power not to cede or waive federal property interests in water on the federal lands that are derived from state law. Congress expressed an intent not to cede its interests in water on reserved lands when it limited the applicability of the Desert Land Act to "public lands."

The scope of federal property interests are often governed by state law. *See Clearfield Trust Co. v. United States,* 318 U.S. 363, 367 (1943); *U.S. v. Little Lake Misere Land Co.,* 412 U.S. 580, 592-595 (1973) (acknowledging that established body of state property law may govern federal land acquisitions). *See also North Dakota v. United States,* 460 U.S. 300, 103 S.Ct. 1095, 1105 (1983). *See also* Petition at 8, n. 4 ("Conceivably, however, state property laws could be 'borrowed' to develop a uniform [sic] national rule, assuming that federal law contains an interstice and that such borrowing is supported by federal policy."). State rules of avulsion have been applied to adjust boundaries of Indian reservations. *See Wilson v. Omaha Indian Tribe,* 442 U.S. 653 (1979).

When it fails to establish a uniform federal rule, Congress has sanctioned the application of state law to determine federal title as well as numerous other legal consequences of the ownership and use of federal property. *Wilson v. Omaha Indian Tribe, supra.* This incorporation of state law arises by implication from Acts of Congress enacted under its Property Clause powers.[13]

Petitioners' claim that the United States cannot enjoy proprietary interests which arise under state law with respect to its national forest lands is belied by *United States v. Boone,* 476 F.2d 276 (10th Cir. 1973). There the Court held that the federal government could bring suit under a state fire suppression costs recovery statute. In *United States v. State of California,* 655 F.2d 914 (9th Cir. 1980), after characterizing *Boone, supra,* as a "decision based in part" upon the local nature of federal suits instituted to protect the proprietary interests of the United States, 655 F.2d at 919, the Court held that California law creating a cause of action for recoupment of costs for fire suppression governed a claim of the United States for reimbursement of the costs of national forest fire suppression.

Petitioners argue that the United States, as owner of the reserved national forest lands, can have no riparian rights under state law, since all of its functions with respect to such lands are sovereign, and not proprietary.

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[13] For example, the federal government is authorized to acquire property for governmental offices and to rent excess office space. *See* 40 U.S.C. 490(a)(12-14). Acquisition of such property and leasing of such property may be governed by state law.

Petition at 12-15. According to petitioners, since it holds the public lands as a sovereign, the United States cannot enjoy "proprietary" water rights under state law. This argument widely misses the mark. In addition to ignoring *United States v. New Mexico, supra,* in which this Court recognized the prerogative of the United States to obtain water rights under state law in accordance with local custom and laws, *see* IV, *supra,* petitioners ignore *Camfield v. United States,* 167 U.S. 518, 524 (1897), in which this Court held that "the government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property." Likewise, in *Kleppe v. New Mexico,* 426 U.S. at 529, 540 (1976), this Court explicitly recognized that Congress, in exercise of its Property Clause powers, is both a proprietor and a sovereign with respect to the federal lands. That the United States as sovereign also claims federal reserved rights that cannot be held by a private party is neither relevant nor inequitable, for as *Kleppe* and *Camfield, supra,* declare, the United States, in the exercise of its Property Clause powers, holds its lands in *both* a proprietary and sovereign capacity. Under *United States v. New Mexico,* the water rights of the United States claimed by it as a proprietor for secondary purposes of a forest reservation are governed by state law.

Nor, as suggested by petitioners, *see* Petition at 8, is there anything abnormal or aberrant in having federal water rights vary according to whether a state has adopted a dual system of water rights or solely the appropriation doctrine. As Professor Trelease has stated:

> At least for the Forest Service these differences are to be resolved according to the different state laws. The Supreme Court said in *United States v. New Mexico* that, in establishing the national forests, Congress intended that for certain purposes the Forest Service should have reserved rights, but for other purposes it must look to state law. *Congress' intention was to allow instream flows in the forests to the extent that state law allows them* . . . .
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> In *California v. United States,* [438 U.S. 645 (1978)] the Court emphasizes the physical and climatic differences between the western states as justifications for section 8 of the Reclamation Act, which mandates that state law shall govern reclamation projects for the production of food and fiber. Why should not the same be true of instream flows? Considering that Mr. Justice Rehnquist handed down *California v. United States,* and *United States v. New Mexico* on the same day, and that in *New Mexico* he cited *California,* it seems reasonable to believe that his justification for state-to-state variation of federal reclamation projects carried over to justify his quite specific ruling that national forests' claims to instream flows should be governed by state law.

Trelease, Uneasy Federalism – *State Water Laws and National Water Uses,* 55 Washington Law Review 751, 774 (November 1980) (emphasis added).[14]

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[14] As another commentator has noted:

> For example, uniformity is not essential to the National Forest management program. It could, in fact, be damaging to the program. "One of the basic concepts of multiple use is that all of these resources are entitled to equal consideration, but in particularized or localized areas, relative values of the various resources are to be recognized." The Secretary of Agriculture must give "due consideration to the relative values of various resources in particular

(Continued on following page)

VI. THE ORGANIC ADMINISTRATION ACT OF 1897 IN NO MANNER PRECLUDES THE UNITED STATES FROM ASSERTING RIPARIAN RIGHTS FOR WILDLIFE PURPOSES ON NATIONAL FOREST LANDS.

The exercise of riparian rights under state law to accomplish forest management purposes constitutes a use of national forest waters for reasonable and beneficial uses under the laws of the United States and the State of California. Waters used by the United States under state law for secondary reservation purposes become unavailable for "domestic, mining, milling, or irrigation purposes" within the meaning of 16 U.S.C. § 481. Thus, the exercise by the Forest Service of its delegated powers to

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(Continued from previous page)

areas." He also must "provide for public participation in the development, review, and revision of land management plans." His approach to land management must be "systematic" and "interdisciplinary," but nowhere is he charged with the duty of achieving uniformity of forest management. This is not surprising; the policy behind the multiple uses that the Secretary must achieve demands that periodic adjustments in use be made "to conform to changing needs and conditions" and that "some land will be used for less than all of the resources." Uniformity simply is not important to the program.

Thus, neither public lands administered by the Bureau of Land Management nor National Forest System lands require uniform management. Because Congress either has adapted its programs to state law or has designed them to allow for variations in management according to local conditions, lack of uniformity will not frustrate any specific federal objectives.

Note, *Federal Nonreserved Water Rights*, 48 U. of Chicago L.R. 758, at 778 (1981).

manage the national forests renders the waters used no longer excess and subject to subsequent appropriation.

In *United States v. New Mexico, supra,* this Court held that federal reserved water rights exist only with respect to primary purposes of reservations, and that the Forest Service must obtain water under state law to manage national forests for secondary purposes.[15] This Court explicitly noted that since Congress has authorized the expenditure of federal funds for the establishment of water rights under state law for use on federal reservations, citing 16 U.S.C. § 17j-2(g), and 16 U.S.C. § 526, Congress has indicated its intent that water rights to advance secondary purposes of federal reservations be obtained under state law. 438 U.S. at 702-703. Thus, in *United States v. New Mexico, supra,* this Court concluded that Congress intended the Forest Service to use water rights recognized under state laws and customs to accomplish congressionally prescribed secondary management objectives of federal reservations.

When Congress had earlier provided in the Organic Administration Act of 1897, 30 Stat. 34, 16 U.S.C. § 473 *et seq.*, that "all waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated . . . ," 16 U.S.C. § 481, it did not intend to preclude the United States from enjoying enforceable appropriative or riparian water rights

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[15] This Court held in *United States v. New Mexico, supra,* that national forests were established primarily for watershed purposes and production of timber. Grazing, recreation, and maintenance of wildlife and wildlife habitat are secondary or corollary purposes.

arising under state law in order to effectuate management objectives. National forests are to be administered for "outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528. In order to fulfill its duty to protect wildlife and fisheries on its lands, 16 U.S.C. § 1604(g)(3)(A), 16 U.S.C. § 1604(i), the Forest Service must have water rights, with priority, under state law. *See also* 16 U.S.C. § 1604(g)(3)(B). In order to accomplish its Congressionally prescribed management objectives in California the Forest Service needs to make use of water rights under state law for wildlife watering, fish and wildlife habitat maintenance, recreation, and many other uses.

When it enacted the Organic Administration Act of 1897, *supra*, authorizing the creation of forest reserves, Congress removed lands reserved under the authority of that act from the operation of the Acts of 1866, 1870, and 1877, acquiescing in the acquisition of senior appropriative rights. Consequently, upon a reservation of federal lands as a national forest, the United States withdraws its general consent to the acquisition of appropriative water rights that would have priority over water rights belonging to the United States under state law needed to manage the forests in fulfillment of congressionally authorized secondary management objectives.[16]

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[16] If the Acts of 1866, 1870, and 1877 are viewed as a waiver of the right of the United States to object to the impairment of the water rights on its public lands, the removal of lands from the operation of those Acts necessarily withdraws the waiver. Consequently, upon a withdrawal of the waiver, either by reservation or withdrawal of the lands from the public domain, the exercised water rights of the United States are senior to subsequently acquired water rights. *See* W. Hutchins, *California Law of Water Rights* (1956) at 56, 180.

Once the United States exercises its riparian rights for a reasonable and beneficial use, pursuant to its prescribed duties, such rights have priority as against subsequent appropriators. The United States may therefore assert, claim, and enforce riparian rights under state law in the same manner as private riparian landowners, subject to appropriative rights vested prior to exercise of its riparian rights.

Petitioners argue, Petition at 23, that the United States cannot assert riparian rights for wildlife purposes on national forest lands because the Organic Administration Act of 1897, *supra*, did not contemplate preservation of wildlife in national forests. In *United States v. New Mexico, supra*, this Court held only that federal reserved rights could not be claimed for wildlife watering. As this Court noted in *United States v. New Mexico*, 438 U.S. at 713-714, the Multiple-Use Sustained Yield Act of 1960, 74 Stat. 215, 16 U.S.C. § 528 *et seq.*, broadened the purposes for which national forests had previously been administered. One of these supplemental purposes was for wildlife. *See* p. 11, n.6, *supra*. If the national forests are to be managed for wildlife purposes, water must be made or kept available for wildlife use. Since federal reserved rights are not available to accomplish the wildlife purposes of forest reservations, water rights arising under state law can be properly claimed and enforced by the United States. When this Court noted in *United States v. New Mexico, supra*, that reservation of water for "wildlife protection" purposes "would defeat the very purpose for which Congress did create the National Forest system", 438 U.S. at 711, it did not intend to imply that use by the Forest Service of non-reserved water rights conferred by state law would not be consistent with the supplemental

or secondary purposes for which the forest reservations had been established.

VII. THE PETITIONERS' ARGUMENT THAT RECOGNIZING THE RIPARIAN RIGHTS OF THE UNITED STATES WOULD DISRUPT SETTLED EXPECTATIONS OF APPROPRIATORS UNDER STATE LAW AND OTHERWISE CREATE CHAOS IN CALIFORNIA'S MANAGEMENT OF ITS WATER RIGHTS SYSTEM IS INCORRECT AND MISLEADING.

Petitioners, at page 24 of their Petition, argue that if the United States holds riparian rights, they "attached" in 1848 and could throw into doubt all competing non-federal rights acquired since 1848. However, not only are riparian water rights limited to the doctrine of reasonable and beneficial use as required by Article X, § 2, of the California Constitution, but riparians who do not diligently exercise their rights may lose their priorities of use under California law. Under *In Re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339 at 358-359 (1979), such riparian rights may be assigned a lower priority if they are not diligently exercised. According to *Long Valley*, "[t]he Board may make determinations as to the scope, nature, and priority of the [unexercised riparian] right that it deems reasonably necessary to the promotion of the state's interest in fostering the most reasonable and beneficial use of its scarce water resources." *Id.* at 359. Thus, riparian rights of the federal government may have senior priority, with respect to the reserved or withdrawn lands, only as of the date of actual, or constructive, exercise for a reasonable and beneficial use.

Since the claimed riparian rights arise under state law, the United States would be subject to the constraints set out in *Long Valley, supra*. These constraints would protect the rights of appropriators. The unexercised riparian and littoral water rights of the United States may take priority as late as the date of exercise, unless the Board should determine an earlier priority date.

Petitioners' hyperbole to the contrary, the acknowledgement of riparian water rights as belonging to the United States will not wreak chaos in the state's water law system. The United States' proprietary water rights (asserted for uses related to the secondary purposes of its reservations) can be harmonized with the existing system, especially in view of the rule of *Long Valley*, providing seniority to appropriative water rights as against unexercised riparian rights.

Petitioners also argue that the United States owns in California large tracts of undivided riparian land, for which riparian water rights claims may be made. When California first adopted the law of riparian water rights, many large Mexican land grant ranchos existed.[17] The riparian water rights belonging to these ranchos were successfully integrated with the state's water rights system. Just as the California Supreme Court did not, in *Lux v. Haggin, supra*, limit the California law of riparian rights in consideration of the size of the ranchos that might

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[17] For example, Rancho Ballona was 14,000 acres in size. *Summa Corp. v. Cal. Ex. Rel. State Lands Commission*, 466 U.S. 198, 203, n.2 (1984). "Mexican land grants encompassed over 10 million acres in California and included some of the best land for development." *Id.* at 202.

come to enjoy such rights, so that Court in this case did not hold the riparian rights doctrine inapplicable to federal lands on the basis of the size of the undivided national forests managed and retained by the United States. *State Water Resources Control Board v. United States, supra,* 243 Cal. Rptr. at 890.

Petitioners finally argue that the California Supreme Court decision impairs the State's management authority over private hydroelectric power projects located on federal lands. Petition at 26-27. Private licensees, however, cannot benefit from or use federal property interests in water unless there has been an assignment of such rights. Petitioners point to no statutory provision authorizing federal land management agencies to make such an assignment. Since none exists, the loss of state regulatory control over hydroelectric projects is highly speculative and, at this time, unwarranted.[18]

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[18] Petitioners also suggest that miners and holders of federal grazing permits may also claim "derivative" riparian rights. The riparian right, appurtenant to the federal lands, cannot be assigned or reallocated without appropriate authorization by law. Congress has not authorized the transfer of its reserved or non-reserved water rights to its permittees or licensees conducting activities on its lands.